JURUTERA CONSULTANT (SEA) SDN BHD & ORS

v.

EDDIE LEE KIM TAK & ORS

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: B-02-526-98]
7 DECEMBER 1998

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Parties entering into mutual agreement not to appeal against decision of High Court - Whether agreement enforceable - Appeal thereof - Whether incompetent - Whether brought in violation of good faith - Stay of execution and proceedings - Whether question of stay could not at all arise - Courts of Judicature Act 1964, s. 44*

CONTRACT: *Terms - Validity - Parties entering into mutual agreement not to appeal against decision of High Court - Whether valid and enforceable - Whether in keeping with sanctity of contract - Right of appeal - Whether could form subject matter of a contract*

The appellants and the respondents had several pending suits in the courts as against each other. In their effort to seek a finality to their disputes, both parties came to an understanding ('settlement agreement') in which they *inter alia* agreed, *vide* item A(13) thereof, that any decision of the High Court in respect of the suits shall be final, conclusive and binding and that they would not appeal against such decision of the High Court. Notwithstanding item A(13), however, the appellants appealed against the decision given by the Shah Alam High Court on 2 September 1998 in respect of one of the pending suits, and thereafter applied to the present court for a stay of proceedings thereunder, or the execution thereof. Following the respondents' objection as to the competency of the appeal, a question arose as to whether the settlement agreement was valid and enforceable, such as to bar the appellate court from entertaining the appeal or the said application for stay.

Held:
Per Gopal Sri Ram JCA

[1] The settlement agreement is a perfectly valid and enforceable agreement. Taking into account item A(13), it has the effect of precluding this Court from entertaining the appeal. And absent a valid appeal, no question of a stay pending the outcome of an appeal may arise under s. 44 of the Courts of Judicature Act 1964.

[2] The right of appeal, though a creature of statute, is a substantive right. And like any other valuable right, it may form the subject matter of a contract and may be bargained away. Actual or potential litigants may therefore agree that the decision of a court of first instance shall be final and that neither of them shall appeal against it. This is entirely in keeping with the doctrines of freedom and sanctity of contract.

[Application for stay refused.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu dan responden-responden di sini mempunyai beberapa tuntutan di antara mereka yang mana tuntutan-tuntutan tersebut masih 'pending' di mahkamah-mahkamah. Dalam usaha mereka untuk memberi kemuktamadan kepada pertikaian-pertikaian mereka, kedua-dua pihak telah mencapai satu persefahaman ('perjanjian penyelesaian') di mana, antara lain, mereka bersetuju, melalui fasal A(13) perjanjian penyelesaian, bahawa apa-apa jua keputusan Mahkamah Tinggi berhubung pertikaian-pertikaian mereka adalah muktamad, konklusif dan mengikat dan bahawa mereka tidak akan membuat apa-apa rayuan terhadap keputusan Mahkamah Tinggi sedemikian. Perayu, bagaimanapun, telah merayu terhadap keputusan yang dibuat oleh Mahkamah Tinggi Shah Alam pada 2 September 1998 berhubung dengan salah satu dari tuntutan yang 'pending' tersebut, dan selepas itu memohon kepada mahkamah ini untuk penggantungan prosiding di bawahnya atau pelaksanaannya. Responden membuat bantahan berhubung kompetensi rayuan, dan persoalan telah berbangkit samada perjanjian penyelesaian di sini sah dan boleh dilaksanakan, yang dengan itu akan menghalang Mahkamah Rayuan dari melayan rayuan tersebut, mahupun permohonan untuk penggantungan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Fasal A(13) dalam perjanjian penyelesaian adalah suatu perjanjian yang jelas sah dan boleh dilaksanakan. Ia mempunyai kesan menghalang mahkamah ini dari melayan rayuan yang dikemukakan. Dan tanpa suatu rayuan yang sah, perkara penggantungan sementara menunggu keputusan rayuan di bawah s. 44 Akta Mahkamah Keadilan 1964 sama sekali tidak berbangkit.

[2] Hak untuk merayu, walaupun lahir dari statut, adalah suatu hak substantif. Dan seperti mana-mana hak bernilai, ia boleh menjadi satu halperkara kontrak dan boleh dilepaskan. Bakal-bakal litigan atau litigan sebenar dengan itu boleh membuat janji bahawa sesuatu keputusan mahkamah yang pertama itu adalah muktamad dan bahawa mereka tidak akan merayu terhadapnya. Ini amat selari dengan doktrin kebebasan dan kesucian kontrak.

[Permohonan penggantungan ditolak.]

Cases referred to:
Anant Das v. Ashburner & Co [1876] ILR 1 All 267 ***(foll)***
Kedarnath v. Sitaram AIR [1969] Bom 221 ***(foll)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 ***(refd)***
Moonshee Amir Ali v. Maharanee Inderjeet Singh [1871-2] 14 Moo Ind App 203 ***(foll)***
Protap Chunder Dass v. Arathoon [1882] ILR 8 Cal 455 ***(foll)***
Rameshwardas v. New Jooria Bazar Sugar Co AIR [1926] Sind 202 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44

For the appellants - YT Ling; M/s Lee, Ling & Partners
For the respondents - Hj Sulaiman Abdullah (Lee Chan Leong & Jasmine Loo with him); M/s Chan Leong & Co

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

This is an application by which the appellants sought to stay all proceedings under, and the execution of, a judgment entered summarily against them on a summons for judgment by the High Court at Shah Alam on 2 September 1998 pending an appeal against that judgment. The action by the respondents against the appellants is based on an agreement contained in the first appellant's letter dated 6 May 1998. The terms set out in that letter were accepted by the respondents on 19 May 1998. The agreement, which I shall, for convenience refer to as "the settlement agreement" seeks to resolve to a finality all disputes forming the subject matter of several suits brought by the parties in different courts. Among the main contentions in support of the application was the argument that there were merits in the appeal because the learned judge was wrong in holding that there were no triable issues.

During submissions, however, the attention of this court was drawn by counsel for the respondents to a term in the settlement agreement which I think places an insurmountable obstacle in the path of the appellants. It is item A(13). It reads:

> Both parties agreed that the decision of the High Court shall be final and conclusive and binding on the parties. The parties further undertake **Not** to appeal against the High Court decision.

This, in my view, is a perfectly valid and enforceable agreement. It has the effect of precluding this court from entertaining the appeal. And absent a valid appeal, no question of a stay pending the outcome an appeal may arise under s. 44 of the Courts of Judicature Act 1964. I notice that similar agreements have come before the courts of India and have been consistently upheld.

The earliest case in point was decided in 1871 by the judicial committee of the Privy Council in *Moonshee Amir Ali v. Maharanee Inderjeet Singh* (1871-2) 14 Moo. Ind. App. 203. before the coming into force of the Indian Contract Act 1872 on which our Contracts Act of 1950 is based. There, the appellant had, notwithstanding an agreement not to appeal to the Privy Council from a decision of the High Court at Fort William, Bengal, done so. Before the board, the respondent took a preliminary objection as to the competency of the appeal. The judicial committee upheld the objection and dismissed the appeal. James LJ, who delivered the advice of the board observed (at p. 207):

> The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the court below.

Other cases where the principle was applied include *Anant Das v. Ashburner & Co.* [1876] ILR 1 All 267, *Protap Chunder Dass v. Arathoon* [1882] ILR 8 Cal. 455, *Rameshwardas v. New Jooria Bazar Sugar Co.* AIR 1926 Sind. 202 and *Kedarnath v. Sitaram* AIR 1969 Bom 221.

I think it is beyond argument that a right of appeal, though a creature of statute, is a substantive right. See, *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529; [1996] 1 MLJ 1. It is equally beyond argument that like any other valuable right, it may form the subject matter of a contract and may be bargained away. Actual or potential litigants may therefore agree that the decision of a court of first instance shall be final and that neither of them shall appeal against it. This is entirely in keeping with the doctrines of freedom and sanctity of contract.

Before us, counsel for the appellant did not seek to argue that the agreement housed in para. A(13) of his client's letter is void and unenforceable. I do not think that it was open for him to do so in the face of the authorities upon the subject.

In the circumstances, the application for stay could not be countenanced by this court. It was dismissed with costs.

The president of the Court of Appeal and my learned brother Abu Mansor Ali, JCA, have seen this judgment in draft and agree with the reasoning and the conclusions therein.

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